UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JOHN E. DAVIS, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 97B00087
GTE FLORIDA INCORPORATED, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(August 14, 1997)

I. BACKGROUND AND PROCEDURAL HISTORY

On April 4, 1997, John E. Davis (Davis or Complainant), through his representative John B. Kotmair, Jr.,[1] filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleges that General Telephone and Electric[2] discriminated against him because of his citizenship status, Compl. ¶¶ 9-10, and committed document abuse by refusing to accept documents he presented, namely a Statement of Citizenship and an Affidavit of Constructive Notice, id. ¶ 16. Complainant states that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on September 12, 1996. Id. ¶ 18. The OSC charge reveals that the two documents in question purport to show that Complainant is not subject to income tax withholding. See C. OSC Charge at 3-4. Complainant states that OSC sent him a letter that advised he could file a complaint directly with OCAHO. Compl. ¶ 19. Complainant enclosed the following three documents with his Complaint: (1) a paper entitled "Privacy Act Release Form and Power of Attorney," which is signed by Complainant and gives permission to John Kotmair to inquire of and procure from GTE information and documents relating to the withholding of taxes; (2) a copy of the charge filed with OSC; and (3) a copy of the letter sent from OSC regarding, among other cases in which Mr. Kotmair is acting as a representative, the present controversy.

Respondent's answer to the Complaint was due May 19, 1997. As Respondent still had not filed an answer by June 17, 1997, I issued a Notice of Entry of Default on that date in which I warned

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[1] Since then, I have excluded Mr. Kotmair from participation in this proceeding for the reasons stated in my Order Excluding Complainant's Representative, entered August 6, 1997.

[2] For reasons set forth in my Order of August 12, 1997, the caption has been corrected so that Respondent's name appears as "GTE Florida Incorporated."

that Respondent should act promptly in filing an answer to avoid a default judgment. Respondent's attorney filed a notice of appearance on June 27, 1997. On July 1, Respondent submitted its Motion to Set Aside Entry of Default,[3] followed one day later by its Answer and its Motion to Dismiss Complaint.

In its Answer, Respondent states that it is improperly named as General Telephone and Electric in the Complaint caption and that its actual name is GTE Florida Incorporated. In response to the allegations of the Complaint, Respondent denies that it discriminated against Complainant because of his citizenship status. Ans. ¶¶ 9-10. Respondent also denies that it committed acts of document abuse. Id. ¶ 16. Respondent enumerates five affirmative defenses to the Complaint: (1) the Complaint is frivolous and should be subject to sanctions under Federal Rule of Civil Procedure 11(c); (2) the Complaint fails to state a claim upon which relief can be granted; (3) Complainant failed to file a charge with OSC within 180 days of the claim upon which he bases the Complaint; (4) Respondent has treated Complainant as a U.S. citizen because it has not subjected him to the thirty percent withholding tax applicable to non-resident aliens in 28 U.S.C. § 1441; and (5) Respondent's treatment of Complainant is necessary to comply with the Internal Revenue Code. Ans. at 2-3.

In the Motion to Dismiss, Respondent requests that I dismiss the Complaint because it is frivolous, it fails to state a claim upon which relief can be granted, and the OSC charge underlying it was filed in an untimely manner. R. Mot. Dismiss at 1-5.

Complainant filed its Reply to Respondent's Motion to Dismiss one week late on July 24, 1997.[4] At the same time, Complainant filed a Reply to Respondent's Answer and Affirmative Defenses.[5] In the Reply to Respondent's Answer and Affirmative Defenses, Complainant states that

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[3] For reasons set forth in my Order of August 12, 1997, I have granted Respondent's Motion to Set Aside Entry of Default.

[4] Complainant's Reply to Respondent's Motion was due July 17, 1997. See 28 C.F.R. §§ 68.11(b), 68.8(a), (c)(2) (1996).

[5] In this document, Complainant replies both to Respondent's admissions and denials of the allegations of the Complaint and to Respondent's asserted affirmative defenses. The Rules of Practice that govern this proceeding only authorize a reply to a respondent's affirmative defenses, and not to the answer as a whole. See 28 C.F.R. § 68.9(d) (1996). Complainant provides further evidence of his confusion over the difference between an affirmative defense and a response to each particular allegation of a complaint. In response to paragraphs nine, ten, sixteen, twenty, and twenty-one of the Answer, all of which contain denials of the allegations in the corresponding paragraphs of the Complaint, Complainant states that "Respondent has not bothered to provided (sic) any law and fact in support of th[ese] defense[s] and is in direct violation of 28 CFR § 68.9(c)(2) to provide 'A statement of the facts supporting **each** affirmative

(continued...)

Respondent fails to provide a statement of the facts that support its first three affirmative defenses, those of frivolousness, failure to state a claim, and timeliness.[6] See C. Reply to Ans. and Aff. Defenses at 3, 5. In response to Respondent's fourth affirmative defense, Complainant states that he has stated his claim sufficiently because he has alleged facts that show "Respondent discriminated against him based on his national origin[7] and his citizenship status." Id. at 7. Complainant argues that Respondent's fifth affirmative defense is an "invalid concept," a phrase Complainant defines as "words that represent attempts to integrate errors, contradictions and false propositions." Id.

In response to Respondent's argument that the Complaint is frivolous, Complainant states, inter alia, that Respondent fails to cite any law that supports Respondent's refusal to honor Complainant's Statement of Citizenship and Affidavit of Constructive Notice. See C. Reply to Mot. Dismiss at 3. Complainant maintains that he has stated a claim of document abuse because Respondent refused to honor his documents. See id. at 6. Finally, Complainant argues that he filed his OSC charge in a timely manner because OSC accepted his charge and that the filing period was subject to equitable tolling because OSC communicated to Complainant that he had the right to file a complaint directly with OCAHO and because Complainant originally filed a charge with the Equal Employment Opportunity Commission (EEOC). See id. at 7-8.

II. STANDARDS GOVERNING A MOTION TO DISMISS

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 350 (11th Cir. 1996); ICA Constr. Corp. v. Reich, 60 F.3d 1495, 1497 (11th Cir. 1995). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. See Stephens v. Department of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir.), cert. denied, 498 U.S. 998, and cert. denied sub nom. Stephens v. Coleman, 498 U.S. 998 (1990); Bent v. Brotman Medical Ctr. Pulse

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[5](...continued)
defense.'" C. Reply to Ans. and Aff. Defenses ¶¶ 9, 10, 16, 20, 21 (emphasis in Complainant's document). In response to the allegations of a complaint, a respondent simply must include "[a] statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation." 28 C.F.R. § 68.9(c)(1) (1996). Respondent, in answering each allegation of the Complaint, has fully complied with the applicable provision, which is 28 C.F.R. § 68.9(c)(1).

[6] Although Respondent does not list the facts in support of those affirmative defenses in the Answer, the Answer incorporates by reference those facts, which are included in Respondent's simultaneously filed Motion to Dismiss.

[7] Complainant, however, does not allege in his Complaint that he was discriminated against because of his national origin. See Compl. ¶ 8.

Health Servs., 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[8] (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5; see also Johannessen, 76 F.3d at 350 (trial court must construe the facts alleged in the light most favorable to plaintiff); ICA, 60 F.3d at 1497 (same). "Conclusory allegations and unwarranted deductions of fact," however, are not assumed to be true. See Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974).[9]

Also, the court "must not . . . assume plaintiffs can prove facts not alleged." Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983) (citing Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Id.

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. Johannessen, 76 F.3d at 349 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Quality Foods, 711 F.2d at 995 (citing same); Bent, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; Zarazinski, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "In the case of a *pro se* action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam)).

III. DECISION AND ORDER

A. Lack of Subject Matter Jurisdiction

Respondent has not argued lack of subject matter jurisdiction as a basis for its Motion to Dismiss. Nonetheless, the issue of subject matter jurisdiction may be raised at any time, even by the court sua sponte. See Fitzgerald v. Seaboard System R.R., Inc., 760 F.2d 1249, 1251 (11th Cir. 1985); Rickard v. Auto Publisher, Inc., 735 F.2d 450, 453 n.1 (11th Cir. 1984) (citing Burgess v. Charlottesville Sav. & Loan Ass'n, 477 F.2d 40, 43 (4th Cir. 1973)); Costigan v. NYNEX, 6 OCAHO 918, at 4-5 (1997), 1997 WL 242199, at *3 (Order Granting Respondent's Motion to Dismiss). In fact, "[a] federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises." Fitzgerald, 760 F.2d at 1251; see also Rickard, 735 F.2d at 453 n.1.

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[8] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

[9] The U.S. Court of Appeals for the Eleventh Circuit "is bound by the caselaw of the former Fifth Circuit handed down before September 30, 1981 unless modified or overruled by [the Eleventh Circuit] en banc." Allen v. Newsome, 795 F.2d 934, 938 n.10 (11th Cir. 1986).

"A court's first duty is to determine subject matter jurisdiction because 'lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed.'" Costigan, 6 OCAHO 918, at 4, 1997 WL 242199, at *3 (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376, reh'g denied, 309 U.S. 695 (1940)). A court "cannot expand or constrict the jurisdiction conferred on it by statute." Horne v. Town of Hampstead, 6 OCAHO 906, at 5 (1997), 1997 WL 131346, at *4 (citing Willy v. Coastal Corp., 503 U.S. 131, 135, reh'g denied, 504 U.S. 935 (1992)). Parties cannot waive jurisdiction, nor can they confer jurisdiction by consent. See Fitzgerald, 760 F.2d at 1251 (citing Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974)).

1. Citizenship status discrimination claim

Complainant alleges that Respondent discriminated against him because of his citizenship status, Compl. ¶¶ 9-10, but he does not allege that Respondent either refused to hire or fired him, id. ¶¶ 13-14. Respondent confirms Complainant's continuing employment relationship with Respondent. See Mot. Set Aside Entry of Default ¶ 7.

"It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment." Horne, 6 OCAHO 906, at 5, 1997 WL 131346, at *4 (citing Naginski v. Department of Defense, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *23). "Controversies over conditions of employment do not implicate the jurisdictional requirements of § 1324b." D'Amico v. Erie Community College, 7 OCAHO 948, at 10 (1997) (Order Granting Respondent's Motion to Dismiss) (citing Costigan, 6 OCAHO 918, at 5, 1997 WL 242199, at *3, and Horne, 6 OCAHO 906, at 6, 1997 WL 131346, at *4). Consequently, I do not have subject matter jurisdiction over Complainant's citizenship status discrimination claim. See Hollingsworth v. Applied Research Assocs., 7 OCAHO 942, at 3, 5 (1997); Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939, at 3-4 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938, at 12, 23 (1997); D'Amico, 7 OCAHO 948, at 10-11; Lareau v. USAir, Inc., 7 OCAHO 932, at 13 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 17 (1997); Jarvis v. AK Steel, 7 OCAHO 930, at 7-8 (1997) (complainant neither fired nor not hired because he retired voluntarily); Smiley v. City of Philadelphia Dep't of Licenses & Inspections, 7 OCAHO 925, at 18-19 (1997); Austin v. Jitney-Jungle Stores of America, Inc., 6 OCAHO 923, at 19 (1997), 1997 WL 235918, at *14; Costigan, 6 OCAHO 918, at 4, 1997 WL 242199, at *3; Horne, 6 OCAHO 906, at 4, 1997 WL 131346, at *3.

2. Document abuse claim

Complainant alleges that Respondent refused to accept the following documents: a "Statement of Citizenship" and an "Affidavit of Constructive Notice." Compl. ¶ 16(a). The Immigration Reform

and Control Act of 1986 (IRCA) provides that

> a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. § 1324b(a)(6) (1994) (emphasis added). Section 1324a(b) delineates requirements of the employment verification system; among those requirements, an employer, within three business days of the date of hire, must examine documents presented by the employee that establish the employee's identity and eligibility to work in the United States. Id. § 1324a(b)(1); 28 C.F.R. § 274a.2(b)(ii) (1997). The employer must record information, including document identification number and, if applicable, expiration date, on the INS Employment Eligibility Verification Form (I-9 form), noting which documents were presented and examined. See id. § 274a.2(b)(v).

The employee must present and the employer must examine one List A document, which establishes identity and work eligibility, or one List B document, which establishes identity only, and one List C document, which establishes work eligibility only. Only certain types of documents are acceptable for establishing an employee's identity and/or work authorization. Acceptable List A documents are noted at 8 U.S.C. § 1324a(b)(1)(B) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A) (1997); acceptable List B documents are noted at 8 U.S.C. § 1324a(b)(1)(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(B) (1997); and acceptable List C documents are noted at 8 U.S.C. § 1324a(b)(1)(C) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(C) (1997).[10]

"The employee completing the I-9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization." Horne, 6 OCAHO 906, at 7, 1997 WL 131346, at *6; see also Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5. In completing the I-9 process, the employer must accept any documents, from the statutory and regulatory lists of acceptable documents, presented by the employee that reasonably appear on their faces to be genuine and to relate to the person presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I-9 violates IRCA's antidiscrimination provisions." Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6 (citing Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The

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[10] Section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amends the INA to restrict the types of acceptable List A and List C documents, but only with respect to hires that occur after a date, to be set by the Attorney General, that falls within one year after the September 30, 1996 enactment date. See Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412(e)(1), 110 Stat. 3009. Therefore, the prior, and more expansive, lists of acceptable documents continue to apply to this case.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6)).

The documents Complainant asserts Respondent refused to accept, a Statement of Citizenship and an Affidavit of Constructive Notice, are not among the types of documents acceptable to show an employee's identity and/or employment eligibility.[11] Complainant's allegation, therefore, fails to implicate the employment eligibility verification system. "[S]ection 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement." Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; accord Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12,23; D'Amico, 7 OCAHO 948, at 11-13; Cholerton v. Robert M. Hadley Co., 7 OCAHO 934, at 13-14 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 7-8; Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 20, 1997 WL 235918, at *15; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 16-17 (1997), 1997 WL 242208, at *13; Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6. Complainant does not even allege that he presented the documents to establish identity and/or work eligibility;[12] consequently, the Complaint itself shows that Complainant's claim fails to implicate the employment eligibility verification system. As a result of the foregoing, I am compelled to dismiss Complainant's document abuse claim because I lack subject matter jurisdiction over Complainant's particular allegations.

B. Failure to State a Claim

1. Citizenship status discrimination claim

Respondent moves for dismissal of the Complaint because the Complaint fails to allege any violation of 8 U.S.C. § 1324b. R. Mot. Dismiss at 2. Respondent correctly notes, by quoting relevant portions of 8 U.S.C. § 1324b(a)(1) and 28 C.F.R. § 44.200(a)(1), that IRCA only governs claims by protected individuals of citizenship status discrimination when the individual is fired or not hired. See also, e.g., D'Amico, 7 OCAHO 948, at 10; Horne, 6 OCAHO 906, at 5-6, 1997 WL 131346, at *4.

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[11] Although a Certificate of U.S. Citizenship, INS Form N-560 or N-561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. § 1324a(b)(1)(B)(ii) (1994) and 8 C.F.R. § 274a.2(b)(v)(A)(*2*) (1997), Complainant's Statement of Citizenship is not such a document.

[12] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [he] can work in the United States." Compl. ¶ 16.

Assuming that the facts alleged in the Complaint are true, and construing those facts in the light most favorable to Complainant, Complainant nonetheless fails to state a viable claim of citizenship status discrimination under 8 U.S.C. § 1324b. Complainant states that he is a U.S. citizen, see Compl. ¶ 2, which means that he qualifies as a "protected individual" under the statute, see 8 U.S.C. § 1324b(a)(3)(A) (1994). As previously noted, however, Complainant expressly denies that he either was refused employment or was fired from his job. See Compl. ¶¶ 13-14. Complainant has not alleged the type of treatment that constitutes discrimination under section 1324b and, therefore, fails to state a claim upon which relief may be granted with respect to citizenship status discrimination. As Respondent aptly puts it, "in this particular case there are no allegations whatsoever that bring the complainant within the purview of the statute." R. Mot. Dismiss at 4.

2. Document abuse claim

In addition to the jurisdictional defect, Complainant has failed to state a claim of document abuse upon which relief may be granted. Complainant alleges that Respondent refused to accept his Statement of Citizenship and his Affidavit of Constructive Notice, but, as Respondent appropriately points out, see R. Mot. Dismiss at 2, Complainant specifically negates the idea that Respondent refused those documents during the employment eligibility verification process. See supra note 12 and accompanying text. Also as Respondent astutely notes, see R. Mot. Dismiss at 4, those documents are not even acceptable for showing an employee's identity and/or work authorization as part of the employment eligibility verification process. See supra notes 10 and 11 and accompanying text.

Assuming that all of Complainant's factual allegations in the Complaint are true, and construing those assumed facts in the light most favorable to Complainant, Complainant still fails to state a claim of document abuse. As I stated on a prior occasion:

> IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA.[13]

Costigan, 6 OCAHO 918, at 9-10, 1997 WL 242199, at *7. Another Administrative Law Judge's recent holding also is particularly apt:

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[13] Complainant maintains that "[d]ispite (sic) Respondents (sic) assertions the legally mandated acceptance under 1324b(a)(6) is not in any way limited to 'for purposes of satisfying the requirements of section 1324a(b),' as Congress has studiously omitted any such limitation." C. Reply to Mot. Dismiss at 6. Contrary to Complainant's assertions, that language of limitation expressly appears in the statute, see supra part III.A.2, and applies to the provision regarding an employer's refusal to honor documents that appear to be genuine and to relate to the individual presenting them, see cases cited in the remainder of part III.B.2.

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [the complainant] asserts that [the respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine.

Lee v. Airtouch Communications, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10, appeal filed, No. 97-70124 (9th Cir. 1997); see also Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12; D'Amico, 7 OCAHO 948, at 14; Cholerton, 7 OCAHO 934, at 13-14; Werline v. Public Serv. Elec. & Gas Co., 7 OCAHO 935, at 8 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 6; Winkler v. West Capital Fin. Servs., 7 OCAHO 928, at 11 (1997); Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 19-20, 1997 WL 235918, at *15; Wilson, 6 OCAHO 919, at 16; Boyd v. Sherling, 6 OCAHO 916, at 26-27 (1997), 1997 WL 176910, at *21-22; Winkler v. Timlin Corp., 6 OCAHO 912, at 6, 10-12 (1997), 1997 WL 148820, at *6, 9-11. Consequently, Complainant fails to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).

C. Timeliness

A complaint regarding an unfair immigration-related employment practice cannot be filed with OCAHO if the conduct giving rise to the complaint occurred more than 180 days before a charge was filed with OSC. See 8 U.S.C. § 1324b(d)(3) (1994). Respondent urges as additional grounds for its Motion to Dismiss that the present Complaint was untimely filed under that provision. See R. Mot. Dismiss at 5. Respondent argues as follows:

> Complainant alleges (Item No. 11) that he applied for employment with Respondent in January 1971. The only other date referred to in the complaint is December 9, 1996, the date on which complainant allegedly filed a charge with the Office of Special Counsel (Item No. 18).
>
> Clearly, this charge is time barred under the 180 day statute of limitations found in 8 U.S.C. 1324b(d)(3)[.]

Id.

Complainant alleges that he applied for employment or worked at Respondent in January 1971. Compl. ¶ 11. Complainant states, however, that he filed his OSC charge on September 12,

1996, not December 9, 1996, as Respondent propounds.[14] See id. ¶ 18. Also, the date of the OSC charge is not the "only other date referred to in the complaint." Complainant references December 1993 as the date from which he requests back pay. See id. ¶ 21.

The letter, signed by Mr. Kotmair, that conveys Complainant's charge to OSC[15] states that Complainant submitted a "Statement of Citizenship" to Respondent in December 1993. C. OSC Charge at 3. Complainant asserts that Respondent did not withhold income taxes from his paycheck "[f]or a period of almost two years" in response to his Statement of Citizenship. Id. Complainant states that a new person was appointed head of Respondent's payroll operations, and Respondent's practice of not withholding income taxes because of his Statement of Citizenship changed. Id. At that time, Complainant states, he submitted his Affidavit of Constructive Notice to Respondent. Id. at 4.

Construing the above facts in the light most favorable to Complainant, it appears that Respondent refused to recognize Complainant's Statement of Citizenship and Affidavit of Constructive Notice almost two years after Complainant originally submitted the Statement of Citizenship in December 1993.[16] Assuming that Complainant submitted his Statement of Citizenship on the last day of December 1993, which is the construction of the facts most favorable to Complainant in construing a statute of limitations, then Respondent would have refused to recognize Complainant's proffered documents on December 31, 1995.[17]

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[14] The date on which Complainant alleges he filed his OSC charge appears as "12/09/96," but, on the OCAHO form complaint, the "12" appears above the blank marked "day," and the "09" appears above the blank marked "month," see Compl. ¶ 18, making the correct reading of the date September 12, 1996.

[15] Attached as an exhibit to the Complaint.

[16] "It is axiomatic that the limitations period begins to run at the time of the alleged discriminatory act, provided that act is sufficiently clear to put Complainant on notice. Thus, an unequivocal notification of termination or rejection of employment delineates the commencement of the limitations period." Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 9 (1996), 1996 WL 670179, at *6 (citing Chardon v. Fernandez, 454 U.S. 6, 7 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258 (1980); and Lewis v. McDonald's Corp., 2 OCAHO 383, at 4 (1991), 1991 WL 531895, at *3 (Westlaw incorrectly lists the OCAHO citation for this case as "4 OCAHO 609")). As Complainant alleges acts of document abuse, and as Complainant's citizenship status discrimination charge hinges on Respondent's refusal to accept Complainant's proffered documents, the "unequivocal" act that marks the commencement of the limitations period in this case is Respondent's rejection of Complainant's documents.

[17] Assuming, in a light that is exceptionally favorable to Complainant, that Respondent started to withhold income taxes from his paycheck a full two years after the latest possible

(continued...)

Complainant filed his OSC charge 256 days after December 31, 1995, well outside the 180 day time frame.[18] Complainant, however, asserts that his OSC charge must have been timely because OSC accepted the charge. See C. Reply to Mot. Dismiss at 7. Specifically, Complainant states:

> Complainant has diligently pursued all known legal remedies in this case in a continuing effort to secure his rights under the Constitution and applicable federal law. If Complainant's complaint was not filed within the applicable statutes of limitation, then OSC would not have accepted the complaint. The complaint was clearly filed within the applicable statutes of limitation as evidenced by OSC's acceptance of the complaint. As 28 C.F.R. § 44.300 prohibits any overlap between charges filed with OSC and EEOC complaints, and as OSC accepted Complainant's charge and did not dismiss it pursuant to 28 C.F.R. § 44.301(d)(1), the Complainant's charge was made within the 180 day limitation.

C. Reply to Mot. Dismiss at 7. As I stated in response to an identical argument presented by another complainant in a case with facts very similar to the ones in the present case:[19]

> Complainant is mistaken as to the effect of OSC's acceptance of his charge. While 28 C.F.R. § 44.301(d)(1) does provide that "[i]f the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice," OSC's failure to properly dismiss an untimely charge is not determinative on the issue of timeliness. In fact, OSC has actually filed cases on behalf of charging parties where the case was dismissed due to the lack of timeliness in the filing of the initial charge. See, e.g., United States v. Hyatt Regency Lake Tahoe, 6 OCAHO 879, at 8-11

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[17](...continued)
submission of the Statement of Citizenship (given the parameter that it was submitted in December 1993), rather than almost two years, as Complainant alleges.

[18] For a charge filed on September 12, 1996, to have been timely, the conduct giving rise to the Complaint could have occurred no earlier than March 16, 1996. Although the record does not reveal the exact date for when Respondent refused to recognize Complainant's proffered documents by starting to withhold income taxes from Complainant's salary, it would be completely unreasonable to read Complainant's statement that Respondent did not withhold taxes from his salary for "almost two years" after December 1993 as asserting that Respondent did not withhold such taxes for approximately two years and three months after December 1993, which is what would be necessary to find that Complainant filed his charge with OSC in a timely manner.

[19] Mr. Kotmair, however, did not appear as a representative of the complainant in that case.

> (1996). Pursuant to 8 U.S.C. § 1324b(c)(2), OSC is responsible for investigating charges and issuing complaints under Section 1324b and in prosecuting such complaints before OCAHO Administrative Law Judges. Accordingly, OSC's function is an investigatory and prosecutorial one, not a judicial one. Therefore, OSC's acceptance of an untimely charge does not [affect] the ability of an Administrative Law Judge to rule on the timeliness of such charge.

Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 12-13 (1996), 1996 WL 670179, at *9 (footnotes omitted).

Complainant further argues that OSC's letter informing him of his right to file a complaint directly with OCAHO should "constitute a waiver of any applicable statutes of limitation and, at the least, call for some equitable modification or indicate that, under the doctrine of equitable tolling, some tolling is appropriate in this case as OSC did not view Complainant's charge as being time-barred." R. Reply to Mot. Dismiss at 7. As discussed immediately above, Complainant erroneously assumes that a letter from OSC notifying a charging party of his or her right to file a charge directly with OCAHO indicates a belief on the part of OSC that the charging party has a meritorious claim. On the contrary, OSC's letter of January 30, 1997, informs that "the Special Counsel has determined that there is insufficient evidence of reasonable cause to believe that any of these charges [of which Complainant's was one] state a cause of action under 8 U.S.C. § 1324b." Letter from David J. Palmer, OSC Senior Attorney, to John B. Kotmair, Director, National Worker's Rights Committee, of 1/30/97, at 1. Complainant disingenuously argues that OSC did not consider the present claims to be time barred. OSC's letter dated January 30, 1997, expressly states that it appears Complainant's charge was "not timely filed with th[at] Office." Id. Complainant is not justified in interpreting OSC's letter as giving tacit approval to his claims, especially when the contents of the letter clearly state otherwise.

Next Complainant argues that he previously filed a complaint with the EEOC[20] and, because of that filing, the filing deadline for the OSC charge should have been waived. See C. Reply to Mot. Dismiss at 8. Complainant correctly notes that the 180 day filing deadline generally is extended for periods in which (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) by misconduct or otherwise, the employer lulled the applicant into inaction during the filing period; or (3) the charging party timely filed his or her charge in the wrong forum. See id. (citing United States v. Weld County Sch. Dist., 2 OCAHO 326, at 17 (1991), 1991 WL 531749, at *13).

A Memorandum of Understanding (MOU) between EEOC and OSC also addresses the issue of the timeliness of an OSC charge that first is filed with EEOC. Under the MOU, OSC and EEOC each have appointed the other "to act as their respective agents for the sole purpose of allowing

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[20] This was the first time Complainant has mentioned a previous filing with EEOC. Complainant does not state the date on which he filed a complaint with EEOC, nor does he include a copy of that complaint.

charging parties to file charges to satisfy the statutory time limits." Toussaint, 6 OCAHO 892, at 10, 1996 WL 670179, at *7 (quoting MOU, 54 Fed. Reg. 32,499, 32,500 (1989)). "A charge is timely filed under IRCA if it is filed with OSC, or an agency with which OSC has an MOU, at the most, 180 days after the alleged discriminatory event." Id. at 11, 1996 WL 670179, at *8 (citing Walker v. United Air Lines, Inc., 4 OCAHO 686, at 29 (1994), 1994 WL 661279, at *18, and Reyes v. Pilgrim Psychiatric Ctr., 3 OCAHO 529, at 2 (1993), 1993 WL 403248, at *1).

However, as the MOU predates the existence of the document abuse cause of action (which was created by the 1990 Act) and only refers to national origin and citizenship status discrimination, "the MOU does not render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline." Id. (citing United States v. Hyatt Regency Lake Tahoe, 6 OCAHO 879, at 11 (1996), 1996 WL 570514, at *8). Consequently, Complainant's filing of a charge with EEOC, even assuming that he filed it with EEOC within the 180 day period, does not render Complainant's document abuse charge timely. I dismiss Complainant's document abuse claim on the additional grounds that the OSC charge underlying it was not filed in a timely manner.

Because the record does not reveal when Complainant filed his EEOC charge, it is impossible to tell from the current record whether Complainant filed an EEOC charge in time to toll the running of the 180 day period for the purposes of filing a timely citizenship status discrimination charge with OSC. The inability to reach a conclusion regarding that issue, however, is immaterial because I already have determined that Complainant's citizenship status discrimination claim must be dismissed on two other independent grounds: lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

D. Rule 11 Sanctions

Respondent states, see R. Mot. Dismiss at 1-2, that the present Complaint is identical to that filed in Hutchinson v. End Stage Renal Disease Network of Florida, Inc., 7 OCAHO 939 (1997), about which Judge Morse states that the filing of the complaint was "a frivolous and irresponsible action by Complainant's representative" in the face of numerous and unanimous precedent rejecting the substantially identical theories Mr. Kotmair has put forth on behalf of so many complainants. See Hutchinson, 7 OCAHO 939, at 2-3. Respondent requests sanctions pursuant to Federal Rule of Civil Procedure 11(c) because "the present claim is so utterly devoid of any merit." R. Mot. Dismiss at 2.

Respondent does not cite any OCAHO cases that support its request that I impose Rule 11 sanctions. In fact, no such authority exists. The Chief Administrative Hearing Officer (CAHO) has stated that neither the CAHO nor the OCAHO ALJs have the substantive powers granted to U.S. district court judges in Federal Rules of Civil Procedure 11 and 37(b)(2). See United States v. Nu

Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 1771, 1780 (Ref. No. 274) (1990),[21] 1990 WL 512158, at *8 (Action by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge's Decision and Order), cited in Toussaint, 6 OCAHO 892, at 21, 1996 WL 670179, at *17. Therefore, Respondent's request for sanctions pursuant to Rule 11(c) is denied.

"However, pursuant to 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(c)(2), once the case has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact." Toussaint, 6 OCAHO 892, at 22, 1996 WL 670179, at *17. I construe Respondent's request for Rule 11 sanctions, which includes the awarding of attorney's fees as an option, see Fed. R. Civ. P. 11(c)(2), as a general request for attorney's fees.

At this time I am reserving judgment on the issue of whether Respondent is entitled to receive attorney's fees and, if so, in what amount. The parties will be given an opportunity to brief the question of attorney fees. Respondent bears the burden of demonstrating that the Complainant's position was without reasonable foundation in law and fact, and that burden is especially heavy when, as here, the Complainant was acting without legal counsel.

Therefore, Respondent is ordered to file, not later than September 12, 1997, a certification of services detailing the fees incurred in connection with this action, including a detailed itemized statement of the hours expended and the hourly rate. It is Respondent's burden to show that the requested attorney's fee is "reasonable" within the meaning of the statute. Further, Respondent will support its request with a legal brief or memorandum showing why Complainant's arguments are "without reasonable foundation in law and fact." Complainant shall have twenty days from the date of service of Respondent's submission to file its response to Respondent's submission.[22]

IV. CONCLUSION

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[21] Citations to OCAHO precedents in bound Volume I, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Law of the United States, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances. Decisions that appear in Volume I will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I decisions.

[22] The parties are reminded that "file" means that the document must be received by my office by that date. See 28 C.F.R. § 68.8(b) (1996).

After considering the parties' pleadings, I grant Respondent's Motion to Dismiss.[23] Assuming that every fact Complainant has alleged is true,[24] I make the following findings:

1. I lack subject matter jurisdiction over Complainant's citizenship status discrimination and document abuse claims;

2. Complainant's allegations of citizenship status discrimination and document abuse fail to state causes of action upon which this forum may grant relief; and

3. Complainant's charge with OSC alleging document abuse was filed more than 180 days after the alleged violation of the document abuse provision.

For those reasons, Complainant's Complaint is dismissed. I retain jurisdiction for purposes of deciding whether Respondent is entitled to attorney's fees in this case.

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[23] "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996) (quoting Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)) (emphasis added). Granting Complainant such an opportunity in the present case would be futile. The Complaint does not fail because it suffers from technical pleading errors; more careful drafting would not turn Complainant's allegations into a cause of action that this forum recognizes. The complaint in cases brought under section 1324b consists of a form that elicits the pertinent information from a complainant. The form complaint seeks information, many times with questions that demand simple "yes" or "no" answers, that set forth the elements of the causes of action that this forum recognizes. For example, paragraphs 13 and 14 of the form complaint demand affirmative or negative responses to the following statements, respectively: "I was knowingly and intentionally not hired" and "I was knowingly and intentionally fired." In this case, Complainant has checked the line marked "No" in response to each of those questions. As that example reveals, more careful drafting would not aid Complainant's cause before this forum.

[24] Complainant vehemently insists that "as in all cases that have been brought before the Office of [the] Chief Administrative Hearing Officer (OCAHO) by the Director of the National Worker's Rights Committee, the respondents have been able (with the help of Administrative Law Judges 'ALJ's' (sic)) to get away with discriminatory practices without disproving the Complainant's facts involving the discrimination." C. Reply Mot. Dismiss at 1-2. Complainant fails to understand that, for purposes of deciding a motion to dismiss, **I assume that every fact he has alleged is true**. See supra part II. Disposing of a claim on the grounds of lack of subject matter jurisdiction and failure to state a claim means it is not necessary to move to a hearing stage in which Complainant would have to prove his allegations, because, even assuming that all the facts Complainant alleges are true, **those facts would not entitle Complainant to any relief in this forum**.

As provided by statute, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.53(b). This final decision and order on the merits is the final decision for purpose of computing time for appeal where I have retained jurisdiction for resolution of fee-shifting issues. See Hollingsworth, 7 OCAHO 942, at 6 (1997) (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), and Fluor Constructors, Inc. v. Reich, 111 F.3d 94 (11th Cir. 1997) (specifically addressing time limit for appeal on the merits when jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding)).

SO ORDERED.

Dated and entered this 14th day of August, 1997.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1997, I have served the foregoing Order Granting Respondent's Motion to Dismiss on the following persons at the addresses shown by first class mail, unless otherwise noted:

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_____

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